***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 75-1058

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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DOCKET NO. 75-1058

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UNITED STATES OF AMERICA

APPELLEE

vs.

HORACE MARBLE

DEFENDANT-APPELLANT

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BRIEF OF DEFENDANT-APPELLANT
HORACE MARBLE

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## STATEMENT OF ISSUES

1. Was it a violation of the defendant's constitutional rights to continue interrogating him after he had invoked his Fifth Amendment right to remain silent?

2. Was it a violation of the defendant's constitutional rights to continue interrogating him after he had indicated he did not want to say anything until his attorney was present?

3. The unlawful arrest of the defendant's wife at gunpoint, the fact that she was handcuffed and transported under guard with the defendant to FBI Headquarters, the fact that she was illegally detained at FBI Headquarters, the fact that she was separated from the defendant during his interrogation, and finally, the fact that he was not told she would be released until after he had agreed to give a statement -- do these circumstances constitute coercion and intimidation, thus rendering the defendant's confession involuntary?

4. Did the defendant knowingly and intelligently waive his constitutional rights when he executed the FBI's "Interrogation: Advice of Rights" form?

## STATEMENT OF THE CASE

On October 23, 1974 at approximately 1:30 p.m. in the central Harlem section of New York City, the defendant, Horace Marble, and his wife, Diane, were taken into custody at gunpoint by three Special Agents of the Federal Bureau of Investigation. Approximately one hour later, Marble signed a statement in which he confessed to robbing tne Constitution Bank and Trust Company in West Hartford Connecticut on April 19, 1974.

On November 15, 1974, a Federal Grand Jury sitting in Hartford, Connecticut handed up an indictment charging Horace Marble with robbing a bank in violation of 18 U.S.C. Section 2113(a). (Appendix 2) On December 9, 1974, the defendant was arraigned before the Honorable T. Emmet Clarie, Chief Judge of the United States District Court for the District of Connecticut at which point Marble entered a plea of "Not Guilty." The Office of the Federal Public Defender for the District of Connecticut was appointed to represent him.

On December 23, 1974, the defendant filed a Motion to Suppress "any and all statements, confessions and/or admissions on the grounds that such evidence was procured in violation of the defendant's constitutional and statutory rights." (Appendix 3)

On Monday, January 6, 1975, a jury was selected and the case set down for trial on January 28, 1975. Three days later, on January 9, 1975, the Court conducted a full evidentiary hearing on the defendant's motion*/ at the conclusion of which counsel was

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*/ Selected portions of the transcript of this proceeding appears as the final exhibit in the Appendix.

given twenty-four hours to file proposed findings of fact and conclusions of law.

On Friday, January 10, 1975, the Government and the defendant filed their respective proposed findings of fact and conclusions of law. (Appendices 5 and 6) The defendant also filed a Memorandum in Support of his Motion to Suppress. (Appendix 7)

On January 14, 1975, the Court issued its Ruling on the Defendant's Motion to Suppress, denying the defendant's motion. (Appendix 8)

On January 24, 1975, the defendant moved for a continuance based on the fact that the court reporter had insufficient time to prepare the transcript of the proceedings of the suppression hearing. The defendant contended that the transcript was essential to his Sixth Amendment right to cross-examine witnesses at his trial. (Appendix 9)

The Court took no action on the defendant's motion and the case proceeded toward trial. On January 29, 1975, the defendant withdrew his plea of "Not Guilty" and entered a plea of "Guilty" reserving his right to appeal the rulings of the Court.

## STATEMENT OF FACTS

On October 23, 1974 at approximately 1:30 p.m., Horace Marble, his wife, Diane, and a third individual were walking down West 112th Street in the central Harlem section of New York City when an unmarked car pulled up beside them. Three white men in business suits emerged from the car with handguns drawn and aimed at the Marbles. A second unmarked car appeared on the scene from which two additional men emerged; one carried a handgun, the other a rifle or shotgun.

The three individuals in the first car were Special Agents for the Federal Bureau of Investigation -- Jerry Mortenson, Milton Ahlerich, and Matt Cronin. The Marbles and their companion were told to turn around with their hands against the wall. A pat-down search of Horace Marble ensued and he was placed under arrest on a charge of parole violation, handcuffed and put in the automobile. No search was conducted of Mrs. Marble but her purse was taken from her. The third individual started to create a disturbance and a crowd began to gather. Mrs. Marble was handcuffed and placed in the back seat of the automobile beside her husband, and the agents hustled the Marbles out of the neighborhood.

In the car, Agent Mortenson gave Marble his constitutional rights, reading from a standard FBI card, and asked him his name and other background questions. Marble said that he had nothing to say and asked why the woman was being arrested. The agents informed Marble that the only reason they were taking the woman (his wife)

along with them was to ascertain her identity. In the course of the automobile ride from the scene of the arrest to FBI Headquarters, Mrs. Marble's identity was determined. She was not released, however, when the agents and the Marbles arrived at Headquarters. Instead, she was taken, still handcuffed, with her husband into the building.

At FBI Headquarters, the Marbles were taken up an elevator to the Criminal Division where they were separated. Horace Marble was taken into an interrogation room, and Diane Marble was turned over to a matron who conducted a strip search.

While the agents asked further background questions, Marble was provided with a standard government advice of rights form. He received the form from Agent Mortenson at 1:55 p.m. and signed the form at 1:57 p.m. In response to further questions, he informed the agents again that he did not want to say anything until his attorney was present. */

Agent Mortenson then left the room to make arrangements for further processing (fingerprints and photographing). Agent Ahlerich continued asking Marble "general background questions." After ten minutes, Marble announced that he wanted to talk about the bank robbery. Agent Mortenson returned to the room shortly thereafter.

Marble was provided with a second advice of rights form which he was handed at 2:13 p.m. and signed at 2:14 p.m. Marble then made a statement in which he confessed his participation in a bank robbery.

Marble was not told that his wife would be released until after he agreed to give a statement, and Marble did not see his wife until after he had dictated his statement to the agents.

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*/ At some point during Marble's interrogation, probably before he gave his statement, the agents conducted a strip search of Marble.

## ARGUMENT

### 1. SUMMARY

The defendant-appellant, Horace Marble, respectfully submits that the court erred in refusing to grant the defendant's motion to suppress. The subject matter of that motion was a statement given by the defendant without counsel and in the course of a custodial interrogation conducted by two Special Agents of the Federal Bureau of Investigation. The defendant contends that this statement was clearly inadmissible for the following reasons:

(1) Shortly after his arrest and then again during questioning, the defendant invoked his Fifth Amendment right to remain silent, but the interrogation continued in plain disregard of the Supreme Court's instructions contained in Miranda v. Arizona, 384 U.S. 436 (1966).

(2) Although the defendant indicated his desire to remain silent until his attorney was present, no lawyer was obtained for him and the questioning continued, thus violating the defendant's constitutional rights under the Fifth and Sixth Amendments.

(3) Considering the totality of the circumstances surrounding the obtaining of Horace Marble's confessions, it is clear that his statement was not voluntary but was instead induced by fear for the well-being of his wife. Thus the defendant's confession was not the product of a free will but of a will overborne by implied threats, intimidation and a coercive atmosphere. The confession should have been suppressed as being involuntary.

(4) Even though the defendant executed two forms which contained statements of waiver, those forms were misleading and confusing and provide insufficient basis for the court to conclude that Marble's waiver was either knowing or intelligent; furthermore, the defendant's speech and conduct after he signed those forms and in the course of the interrogation conclusively demonstrates that he did not realize that by signing those forms he gave up his constitutional rights. The defendant's confession is therefore inadmissible.

The defendant respectfully suggests that any one of these reasons standing alone is sufficient ground for this court to vacate the defendant's judgment of conviction.

2. THE DEFENDANT'S STATEMENT SHOULD HAVE BEEN SUPPRESSED BECAUSE THE DEFENDANT WAS DEPRIVED OF HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT.

After his arrest on October 23, 1974, the defendant invoked his Fifth Amendment right to remain silent on two occasions, but on both occasions, the FBI disregarded his request, sought to obtain a retraction by supplying the defendant with government waiver forms, and continued to ask him questions.

According to testimony by the defendant which was neither controverted nor challenged by the agents, Marble invoked his right to remain silent after he had been read the Miranda warnings by Agent Mortenson while being driven from the scene of the arrest to FBI Headquarters. (Transcript,pp. 26, 83,102) Despite the defendant's claim to silence, he was supplied with a government waiver form and asked further questions upon his arrival at the Headquarters. (Transcript,

pp. 9-11)

After signing the FBI "Interrogation: Advice of Rights" form, Marble then invoked his right to remain silent a second time. (Transcript, pp. 32-33, 65) The defendant also indicated that he did not wish to make any statement until his attorney was present. (Transcript, p. 33) Agent Mortenson then left the room and Agent Ahlerich continued the interrogation.

> I began asking background questions, height, weight, date of birth, place employed, where he had been in the last few months, where he was working -- personal background data, identifying data.
>
> (Transcript, p. 67)

After approximately ten minutes of "background questions," the defendant, according to Ahlerich, spontaneously announced his desire to talk about the bank robbery.

The defendant's version of what happened after he invoked his constitutional right to remain silent is somewhat different:

> A: ... Mortenson left and Ahlerich stayed.
>
> Q: What happened then?
>
> A: He continued to threaten me, telling me he was going to arrest my wife. And he told me even if he didn't make it stick, she would have to make bail, and she might not make bail and she'd have a hard time.
>
> Q: Then what happened?
>
> A: He continued to tell me that, if I didn't cooperate, you know, if I was a man I would, you know, get my wife out of this mess.
>
> Q: At this point, did you agree to make a statement?
>
> A: He worked on me a while.
>
> (Transcript, p. 108)

Putting aside for a moment the conflict in testimony as to the substance of what was communicated by Ahlerich to Marble when they were alone together for that ten minute period, there can be no dispute -- and the agents do not deny -- that interrogation did continue after Marble announced his intent to remain silent, and there can be no dispute that shortly after the interrogation resumed, Marble did provide a statement.

(a) By supplying Marble with a waiver form and by continuing to question him after he invoked his right to remain silent, the FBI violated Marble's rights under the Miranda decision

The procedure followed by the FBI Agents in supplying Marble with a waiver form when they got to FBI Headquarters and by continuing to interrogate him after he invoked his right to remain silent is directly contrary to the express instructions of the Supreme Court as set forth in the Miranda decision. Even after an initial waiver of constitutional rights by a suspect, which is not the case here, Miranda strictly limits the scope of custodial interrogation.

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut-off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been invoked. 384 U.S. at 473-474.

Where, as here, custodial interrogation proceeds without the

presence of defense counsel, the Government bears a "heavy burden" of demonstrating that the suspect's constitutional rights have been respected. 384 U.S. at 475; See also, Lego v. Twomey, 404 U.S. 477, 479 n.1 (1972).

The Government has failed to meet that burden with respect to its treatment of Horace Marble.

After Mortenson had read Marble his rights in the car and after Marble at that time indicated that he had nothing to say, it was a clear violation of the defendant's rights under Miranda for the agents either to initiate further questioning -- which they did upon their arrival at FBI Headquarters -- or to seek retractions from the defendant by suppling him with the advice of rights and waiver forms -- which also happened at FBI Headquarters.*/ As the Seventh Circuit stated in United States v. Crisp, 435 F.2d 354,357 (7th Cir. 1970):

> [O]nce the privilege has been asserted ... an interrogator must not be permitted to seek its retraction, total or otherwise.

Even after Marble signed that first waiver form (Appendix 10), he maintained his right to remain silent, thus making Ahlerich's further background questioning patently beyond the bounds of constitutional propriety.

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*/ "No waiver shall be sought from an arrested person after any time that he has indicated in any manner that he does not wish to be questioned or that he wishes to consult counsel before submitting to questioning." Model Code of Pre-Arraignment Procedure, American Law Institute (Study Draft No. 1, 1968) Section A5.08(2)(e).

In addition, Ahlerich's claim that he asked only background questions merits close scrutiny. First, even if Ahlerich's characterization of his further interrogation of Marble is accurate -- "personal background data, identifying data" -- those kinds of questions can be asked in a tone and in a manner which can also fall easily within the defendant's description, "He worked on me a while."

Secondly, questions that may theoretically be asked to elicit "background" information can also have direct relevance to the crime or crimes that the defendant is accused of. "Where he had been in the last few months," for example, is one of Ahlerich's "background" questions which had direct bearing on Marble's physical whereabouts at the time of the bank robbery.

More relevant to the issue of coercion -- discussed more thoroughly below -- is the fact that any "background" questions relating to Marble's wife -- where Marble was living at the time of his arrest, his wife's address, whether he was living with her, and so forth -- were directly related to the possible criminal liability of Marble's wife, as suggested by Agent Mortenson, on charges of harboring a fugitive. Ahlerich conceded that such questions were probably asked. (Transcript, pp. 143,145)

All of these considerations, of course, were behind the Supreme Court's strict injunction in Miranda against <u>any</u> interrogation after a defendant invokes his Fifth Amendment right of silence. A question is a question, and no matter how innocuous the purported subject, the process of questioning itself is coercive.

Furthermore, Ahlerich's testimony as to his "background" questioning of Marble must be viewed in the context of Agent Mortenson's testimony. Mortenson testified that after Marble signed the first advice of rights form, Marble was questioned as to personal background -- "height, weight, full name, employment, place of residence; things of this nature." (Transcript, p. 11, 33) This questioning occurred while Mortenson was still in the room. Ahlerich then testified that he asked Marble personal background questions after Mortenson left the room. If background questions had already been asked before Mortenson left the room, there was absolutely no need to ask further background questions after Mortenson left the room.

In addition, Ahlerich testified that Mortenson was out of the room for approximately ten minutes (Transcript, p. 66) and that Marble agreed to provide a statement almost simultaneously with Mortenson's return to the room (Transcript, p. 67) Aside from the issue of whether Ahlerich threatened Marble or his wife during this period, it is implausible that a sufficient number of constitutionally permissible background questions exist -- even assuming that some background questions can, in fact be considered constitutionally permissible -- to occupy a full ten minutes of time.

The procedural safeguards imposed by Miranda were premised upon the belief that custodial interrogation in the absence of counsel is inherently intimidating and destructive of the free enjoyment of the constitutional privilege against self-incrimination. To be effective, those safeguards must be fully observed and the

rights of the suspect must be jealously guarded.

> Not even the slightest circumvention or avoidance may be tolerated. The rule that interrogation must cease, in whole or in part, in accordance with the expressed wishes of the suspect means just that and nothing else. Once the privilege has been asserted, therefore, an interrogator must not be permitted to seek its retraction total or otherwise. Nor may he effectively disregard the privilege by unreasonably narrowing its intended scope. (Emphasis added) United States v. Crisp, supra.

See also, United States v. Priest, 409 F.2d 491 (5th Cir. 1969)

United States v. Slaughter, 366 F.2d 833 (4th Cir. 1966)(enbanc)

(b) The FBI's interrogation of Marble does not comply with the standards set forth in United States v. Collins, 462 F.2d 792 (2d Cir. 1972).

In Collins, this circuit dealt with a claim similar to Marble's as to the constitutionality of continued interrogation after an accused has stated his wish to have interrogation cease. The Collins court justified further interrogation on the ground that the government agents requested Collins to reconsider his decision to remain silent and there was a long period of time "between the agent's request to reconsider his [the defendant's] decision to remain silent and the confession." The Collins court found that Miranda did not prohibit police officers "from ever asking a defendant to reconsider his refusal to answer questions." The court said:

> So long as such reconsideration is urged in a careful, noncoercive manner at not too great length, and in the context that a defendant's assertion of his right not to speak will be honored, it does not violate the Miranda mandate. 462 F.2d at 797.

The facts of Marble's interrogation are considerably different

from those described in Collins. First, neither Mortenson nor Ahlerich made a "Collins request" of Marble -- either after he refused to answer questions in the car or after he invoked his right to silence during the interrogation at FBI Headquarters. As in United States v. Wedra, 343 F. Supp 1183, 188 fn. 24 (SDNY 1972), Marble must be distinguished from Collins because

> ".... in Collins the defendant was asked to reconsider his prior declinations to discuss his case; herethere was no such request...

Furthermore, unlike Collins, Marble had virtually no time in which he could reflect on and rationally reconsider his decision to remain silent. Between the time he last invoked his rights, and the time he finally agreed to confess, he was continuously interrogated. Then, when he was given the second advice of rights form, he spent barely a moment reviewing his constitutional safeguards. According to the notations on the waiver form itself, this document was handed to Marble at 2:13 p.m. and signed by Marble at 2:14 p.m. -- a space of precisely one minute (at most) in which Marble presumably reread his rights and reconsidered his decision. (Appendix 11)

Finally, Collins required a "context" in which a defendant's assertion of his right will be honored. In Collins, for example the court found that Collins was never "questioned nor in any way addressed without being expressly told that the questioning would cease if he so desired." Ahlerich made no such statements to Marble, and indeed, Marble had tangible proof that any such request would go unheeded since it had already been disregarded on two prior occasions.

The Second Circuit regarded the issues raised in the Collins case to be of such import, the circuit issued a per curiam opinion

setting forth the rule which governs this case.

> ... we are agreed that what Miranda requires is that "interrogation must cease" until new and adequate warnings have been given and there is a reasonable basis for inferring that the subject has voluntarily changed his mind.

The en banc opinion of the Second Circuit raises the question as to whether the second advice of rights form -- identical to the first -- which was provided to Marble after he agreed to confess but before he actually confessed satisfies the "new and adequate warnings" requirement of Collins.

The defendant respectfully suggests that the warnings contained in that form were, in the circumstances of the Marble interrogation, old and inadequate.

In a fact situation concededly somewhat different from that presented by Marble*/, the court in United States v. Wedra, supra, supplied an important interpretation of what "new and adequate warnings" means when an accused invokes his right to silence.

> Wedra's answers after his initially stated desire to remain silent alerted Pohl and other agents to the fact that he had assumed contradictory positions. ... the agents, before proceeding , should not only have emphasized his right to have his counsel present, but also questioned him "to determine whether his apparent change of position was the product of intelligence and understanding or of ignorance and confusion" or due to a state of apprehension. No such further inquiry was made -- on the contrary the interrogation continued. 343 F. Supp. at 1186.

The applicable rule seems clear: after an accused invokes his right to silence, special precautions should be taken -- over and

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*/ Wedra had an attorney who had already appeared and been assured by the government agents that his client would not be interrogated in his absence. Wedra's attorney had also advised Wedra not to answer any questions.

above the original warnings -- to guarantee that any change in the accused's position is done with full knowledge that he is giving up a right which he previously had invoked and that such an act of waiver is in fact totally voluntary.

In light of Wedra and common sense, "new and adequate' implies something more than a second identical advice of rights form. But, other than handing Marble a second form, Special Agents Mortenson and Ahlerich did not probe the reasons for Marble's capitulation. No further inquiry was made to determine whether his change of position was the product of intelligence or understanding or of ignorance and confusion. Indeed, the true purpose in giving the second form to Marble had nothing whatsoever to do with giving Marble "new and adequate warnings;" it was to satisfy official routine. When Agent Mortenson was specifically questioned on this point by the trial court, his testimony indicates that Marble's signing of the second form was perfunctory, a formality, purely routine.

EXAMINATION BY THE COURT

Q: I was just curious. He signed the waiver of his rights, Government's Exhibit 1, and at that time he made reference to the fact that he wanted to talk to his attorney; is that correct?

A: I believe he said that, sir. I'm not so sure, but I believe he wished -- he said he wished not to make a statement.

Q: So I would inquire, what was the reason for having him sign the second waiver of rights? What was your purpose in having him do that?

A: That's standard Bureau policy, whenever we take a signed statement from anyone we always begin it -- at least the bank robbery squad does -- on the advice of rights, so that in case a question ever comes up as to whether this individual was given his rights, the initial part will be on the interrogation of advice of rights.

Q: And was the fact that he had previously told you he didn't want to make a statement until his attorney was present, was that a second reason why you asked him to sign the second waiver of rights?

A: No, you Honor. It is merely policy.

Q: Did you ask him, in view of the fact that his statement was that he didn't want to make a statement to you because his attorney was not present, or he did not have an attorney -- did you ask him or make any inquiry of him, that had he changed his mind or his stand or posture or position; that "Do you want an attorney here before you give this statement?"

A: No, your Honor, I did not.

[Transcript, pp. 46-47]

The defendant submits that a routine offering of a second advice of rights form followed by a perfunctory signing -- Marble spent a minute at most with the form before signing it -- by the accused clearly does not satisfy the "new and adequate warnings" test set forth by the Second Circuit in Collins.

The further requirement that there be a reasonable basis for inferring that the defendant's change of mind was voluntary is also plainly absent in Marble's case. Whether or not Ahlerich's questioning

was in fact "background" and whether or not Ahlerich invoked Diane Marble's future welfare as a lever to pry a statement from her husband, nothing appears in the record from which an inference can be drawn that Marble's change of heart was voluntary. Between the time that Marble invoked his Fifth Amendment right to silence and the time that he agreed to give a statement, the coercive atmosphere only intensified. Marble was the subject of a humiliating strip search, and Ahlerich continued his interrogation. The events occuring during this interim period simply do not supply any "reasonable basis" for inferring that the defendant changed his mind freely and voluntarily.

Horace Marble's constitutional right to remain silent, his precious Fifth Amendment privilege against self-incrimination was plainly disregarded by the government agents in this case, and the confession which resulted should have been suppressed.

3. THE DEFENDANT'S STATEMENT SHOULD HAVE BEEN SUPPRESSED BECAUSE HE WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO HAVE HIS ATTORNEY PRESENT DURING INTERROGATION BY THE FBI.

Horace Marble testified that he advised Agents Mortenson and Ahlerich that he would not "have anything to say unless my attorney is here." (Transcript, p. 106) On two separate occasions during the suppression hearing, Mortenson corroborated Marble's testimony. (Transcript, pp. 33,47) When asked whether the agents offered to get Marble a lawyer, Mortenson said, "We offered him a phone call that he could make anytime he wanted." (Transcript, p.33)

In Miranda, the Supreme Court unequivocally stated that a defendant's request for an attorney should bring an abrupt halt to all questioning.

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time the indiviudal must have the opportunity to confer with an attorney and to have him present during any subsequent testimony. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to the police, they must respect his decision to remain silent. 384 U.S. at 474.

In Combs v. Wingo, 465 F.2d 96 (6th Cir. 1972) the accused agreed to make a statement but requested an opportunity to talk to an attorney first. As with Horace Marble's interrogation, the police ignored his request and continued questioning him, at which point the defendant confessed. With no factors present other than the officials disregard of the defendant's request, the Sixth Circuit concluded that the defendant's statement was involuntarily made under Fifth Amendment standards.

As the Fourth Circuit stated in United States v. Slaughter, supra

> Evidence that an accused has previously asserted his right to confer with a counsel is a factor which weighs heavily against a finding that a subsequent uncounseled confession is voluntary. 366 F.2d at 840-841.

In United States v. Blocker, 354 F. Supp. 1195 (DCDC 1973) the defendant testified that

> upon arriving at the station house he requested a lawyer but was told that the police do not provide lawyers. According to the defendant, the police advised him that he could discuss the matter with someone who was coming over from the "federal building." 354 F. Supp at 1197.

As with Horace Marble, the defendant in Blocker was subjected to a strip search shortly after his arrest, and, as with Marble many of the questions put to the defendant during his interrogation were purportedly about routine administrative matters. 354 F. Supp at 1198. Even in the presence of a variety of other constitutionally dubious factors, the court in Blocker chose to base its decision to disallow the confession solely on the ground that the defendant had requested counsel, the request had been ignored and interrogation had proceeded.

> The court therefore finds that the confession occurred after defendant had requested and been denied counsel. Consequently evidence of the confession must be suppressed. 354 F. Supp at 1200.

See also United States v. Clark, 15 CrL 2419, (4th Cir. decided July 9, 1974)

If for no other reason, the fact that Agents Ahlerich and Mortenson took no heed of Horace Marble's statement that he would not say anything until his lawyer was present should have rendered his subsequent confession inadmissible.

4. THE DEFENDANT'S STATEMENT SHOULD HAVE BEEN SUPPRESSED BECAUSE IT WAS NOT GIVEN VOLUNTARILY BUT WAS INSTEAD THE PRODUCT OF FEAR AND COERCION.

Any confession such as Marble's -- obtained in the course of uncounseled custodial interrogation -- merits special scrutiny since, as the Supreme Court explicitly recognized in Miranda, the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation.

> [u]nless adequate protective devices are employed to dispell the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the produce of his free choice. 384 U.S. at 458.

> [W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely. 384 U.S. at 467.

Over and above the inherently coercive atmosphere of Horace Marble's incustody interrogation at FBI Headquarters, the actions of the agents leading up to and surrounding his arrest and confession sharply intensified the coercive pressures already operating on the defendant, to the extent that Marble's decision to provide a statement was clearly involuntary, more the product of compulsion than of an unfettered and tational intellect.*/ The fact that Marble invoked

*/ See, Lynum v. Illinois, 372 U.S. 528, 534 (1962); Culombe v. Connecticut, 367 U.S. 568, 604-605 (1960); Watts v. Indiana, 338 U.S. 49, 52 (1948).

his right to remain silent twice before finally capitulating and providing a statement should be regarded as prima facie evidence of a will that is overborne rather than one that is free.

More importantly, however, is the testimony relating to the treatment Marble's wife received in Marble's presence at the hands of the FBI agents.

At the suppression hearing, Marble and his wife both testified that the arresting agents told Marble that his wife's fate was directly linked to whether or not Marble cooperated. Mrs. Marble recalled that an agent said that "if Horace hassled them that they were going to hassle me." (Transcript, p. 127) Horace Marble testified that an agent said to him to stop worrying about his handcuffed hands and to start worrying about his wife. (Transcript 102) Marble testified further that during the interrogation, Agent Ahlerich

> continued to threaten me, telling me he was going to arrest my wife. And he told me even if he didn't make it stick she would have to make bail, and she might not make bail, and she'd have a hard time... He continued to tell me that, if I didn't cooperate, you know, if I was a man I would, you know, get my wife out of this mess. (Transcript, p.108)

Agent Ahlerich and Agent Mortenson denied that any such comments were ever made, and the trial court chose to believe the agents and disbelieve the Marbles concerning any such explicit threats by the agents.*/

Whether or not the agents actually said the words of intimidation, any careful and objective examination of the uncontested facts of

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*/ It should be pointed out that Agent Mortenson was not in the room at the time Ahlerich allegedly threatened Marble, and furthermore, that although there was conversation going on in the car between Ahlerich, Marble and his wife, Mortenson could not recall everything that was said. (Transcript, p. 29)

Marble's arrest and interrogation -- particularly in light of the confused testimony of the agents -- cannot help but lead to the conclusion that Mrs. Marble was taken into custody and used by the agents for the specific purpose of levering a confession out of her husband. Even if no such specific intent can be imputed to the agents, the effect of their actions is indisputable. The indirect threat was as palpable as any spoken word.

At the time of the Marbles' arrest, the third individual present vigorously resisted the agents. Although Mrs. Marble offered no resistance (Transcript, pp. 42-44), it was Mrs. Marble who was handcuffed at gunpoint and taken away under guard. One cannot help but wonder why FBI agents would "detain" an unresisting woman and disregard a protesting obstructionist third party if there were not some other ulterior motive for her "detention."

There is no dispute that the agents had no warrant for Mrs. Marble's arrest. Nor did any probable cause exist to believe that she had committed or was in the process of committing a crime. Moreover, it is extremely difficult to fathom from the agents' own testimony what the underlying reason was for Mrs. Marble's arrest. The agents presented two different rationales.

Mortenson testified that at the time of her "detention" Mrs. Marble was handcuffed and taken into custody because she would not identify herself. (Transcript, p. 42) But Ahlerich testified that Mrs. Marble had indeed given him a name. Said Ahlerich:

Q: Did you speak with the woman at anytime?

A: Yes.

Q: At that arrest?

A: Yes, his wife was there.

Q: What did you say to her?

A: I think I asked her what her name was at that point.

Q: Did she give you an answer?

A: I believe she gave a fictitious name. I believe she gave us some fictitious name, or a name which was not her true name.

Q: How did you know it was fictitious if you didn't know who she was?

A: I think some identification was shown which later on proved that to be a fictitious name.

(Transcript, p. 80)

According to Ahlerich, then, the agent who spoke with her on the spot, Mrs. Marble was not taken into custody -- at least initially -- to ascertain her identity.

Ahlerich and Mortenson agree on one aspect of the identification problem: in the course of the trip from the scene of the arrest to FBI Headquarters, Mrs. Marble's true identity came out. (Transcript, pp 48, 62, 82) Despite the fact that the agents had ascertained the true identity of the woman whom they had handcuffed and transported to FBI headquarters, and aside from the questionable tactics of subjecting an individual to such force for the purposes of learning identity, Mrs. Marble was not released when they arrived at FBI Headquarters. The handcuffs remained on and she was taken inside the building to the Criminal Division. In Ahlerich's judgment, Mrs Marble was not free to leave until a matron had completed a strip search of her. (Transcript, p. 88)

Ahlerich testified that one of the reasons that Mrs. Marble was

taken into custody was to transport her to Headquarters to be searched -- all in the name of "agents' safety." (Transcript, pp. 59-62) "Agent safety" may be a perfectly legitimate reason to handcuff a newly arrested prisoner; it may be a perfectly valid reason for searching a newly arrested prisoner. It is not a sufficient justification to arrest someone in the first place.

None of the reasons supplied by the agents are remotely adequate to explain Mrs. Marble's treatment. There was no warrant, there was no probable cause, and yet she was handcuffed at gunpoint, thrust into an automobile, transported downtown under guard, and strip searched. Hers was clearly an illegal arrest and an unlawful detention the effect of which could not have been other than to intimidate her husband.

In addition to the fact of Mrs. Marble's arrest, Agent Mortenson testified that he, in response to questions from Marble, made explicit reference to the possibility of prosecuting her on the charge of harboring a fugitive. (Transcript, p.48) Marble asked, "Why don't you let her go now?" after she had finally been identified. Mortenson testified: */

> It was myself that indicated that she would be processed at the station, and I think the topic of conversation was that we didn't have a right to take her. And I said, "Well, there could be a possible violation of the harboring statute here. (Transcript. pp. 53-54)

Mrs. Marble's testimony that she heard threats to her husband that she might be prosecuted for "harboring" (Transcript, p. 125) was not, then, a figment of her imagination.

*/ Agent Mortenson never specifically denied the allegations made by Marble (Transcript, pp. 117-118, p. 106)

In addition to the above testimony, the following additional uncontested facts emerged during the suppression hearing:

(1) After Marble invoked his right to remain silent and indicated that he would not answer any questions until his attorney was present, Agent Ahlerich asked Marble a series of "background" questions, some of which specifically related to his wife (Transcript, pp. 143-145) and could be regarded as implicit threats, as seeking incriminating information about his wife for the purpose of prosecuting her in the event Marble should not cooperate;

(2) Marble agreed to give a statement while those questions were being asked;

(3) Marble was not informed that his wife would be released until after he had agreed to give the statement and not until after he had dictated the confession statement to Ahlerich.

Putting to one side the conflict in testimony between the agents and the Marbles, it is inescapable that Mrs. Marble's unlawful arrest and illegal detention had an immediate and powerfully coercive effect on her husband. When asked why he signed the confession, Marble replied:"He told me he was going to arrest my wife if I didn't sign it." (Transcript, p. 109)

The case of People v. Trout, 54 Ca. 2d 576, 354 P2d 231, 80 ALR2d 1418 (1960) decided by the California Supreme Court sitting en banc bears such a striking similarity to Marble's case, it deserves special attention.

> In Trout, the defendant and his wife were arrested at gunpoint by eight officers. In Marble, the defen- and his wife were arrested at gunpoint by five officers.
>
> In Trout, immediately after the defendant confessed,

his wife was released. In Marble, immediately after the defendant agreed to confess and after he had dictated his statement, his wife was released.

In Trout, the defendant and his wife testified that the police told them that his wife would be retained in custody until he confessed. In Marble, the defendant and his wife testified that the agents said that Marble's cooperation would affect whether or not his wife was arrested and/or kept in jail.

In Trout, the police testified that they did not nor did they hear anyone use words to the effect that the defendant's wife would be released if he confessed. In Marble, the agents made a similar denial.

In Trout, the defendant stated that the only reason he made the confession was to secure his wife's release. In Marble, the defendant testified that he signed the statement because he was told that his wife would be arrested if he didn't.

In Trout, the defendant testified that one of the officers asked him what manner of man he was to allow her to go to jail when all he had to do was confess. In Marble, the defendant testified that one of the agents said that if he were a man he would get his wife out of this mess.

In Trout, the police testified that Mrs. Trout was a suspect in this case as well as her husband. In Marble, agent Mortenson testified that he told Marble that his wife might be charged with violation of the harboring statute.

The California Supreme Court concluded:

> Irrespective of what words may or may not have been used by the police, the reasonable conclusion to be drawn from the undisputed facts is that the police held Mrs. Trout in custody for the purpose of securing a confession from the defendant. She was placed under restraint as soon as the police entered her home, although they had no grounds for her arrest ... [The People] assert that her inconsistent replies to questions asked at her home warranted suspecting her as a participant and justified taking her into custody.

> We do not agree. Whether or not there were express threats or promises making Mrs. Trout's release from custody dependent upon defendant's confessing to the crimes, the undisputed facts discussed above show that such a threat or promise to defendant was implied... We are satisfied that the confession resulted from improper pressure by the police..."
> 80 ALR2d at 1425

In determining whether a confession is voluntary, the court must satisfy itself that the confession was "the product of an essentially free and unconstrained choice by its maker," that it was "the product of a rational intellect and a free will" and that the defendant's will was not overborne." In making this determination, the court must consider the "totality of the circumstances" surrounding the obtaining of the confession. Schneckloth v. Bustamonte, 412 U.S. 218, 227-228, 13 CrL 3107 (1973).

The defendant respectfully submits that when the totality of the circumstances are taken into consideration -- the guns at the scene of arrest, the handcuffing and "detaining" of Mrs. Marble, the threat of potential prosecution of Mrs. Marble for harboring a fugitive, the request for an attorney that was ignored, the request to remain silent which was also ignored, the strip searches at Headquarters, the separation of the Marbles, the fact that Marble was under the influence of a drug (Transcript, p ), the fact that Marble was not told his wife was to be released until after he agreed to give a statement -- the only conclusion that can be drawn is that Horace Marble's will was overcome and that his confession was involuntary.

5. THE DEFENDANT'S STATEMENT SHOULD HAVE BEEN SUPPRESSED BECAUSE HE NEVER KNOWINGLY AND INTELLIGENTLY WAIVED HIS CONSTITUTIONAL RIGHTS.

Whenever a defendant in a criminal proceeding gives up fundamental constitutional rights -- whether he does so by pleading guilty, confessing to the commission of a crime, or by waiving his right to counsel -- that waiver must be carefully scrutinized in the context of certain well-established constitutional principles.

It is well settled that fundamental constitutional rights will never be presumed to be waived. United States v. Glasser, 315 U.S. 60, 70 (1941); See also, Butzman v. United States, 205 F.2d 343, 351 (6th Cir. 1953), cert.den. 346 U.S. 828. In fact, the courts recognize a strong presumption against the waiver of constitutional rights, and in the absence of clear evidence to the contrary, that presumption will persist and prevail. In Carnley v. Cochran, 369 U.S. 506, 513-517 (1961), for example, the Supreme Court held:

> Presuming waiver from a silent record is impermissible. The record must show or there must be an allegation and evidence which show that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.

See also Boykin v. Alabama, 396 U.S. 238 (1968) and McCarthy v. United States, 394 U.S. 459 (1968) for constitutional standards relating to pleas of guilty.

It is also clear that the presumption against waiver is not easily overcome, that the government carries "a heavy burden against the waiver of constitutional rights." D.H.Overmyer Co. v. Frick Co., 405 U.S. 175 (1972)(Justice Douglas concurring); See also Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)

According to Johnson v. Zerbst, 304 U.S. 458 (1938), Brady v. United States, 397 U.S. 742 (1970) and Lego v. Twomey, 404 U.S. 477 (1972), a confession can be received into evidence only after the government has established by a "preponderance of the evidence" that the confession was voluntary and that it was also a "knowing and intelligent act done with sufficient awareness of relevant circumstances and likely consequences."

Horace Marble contends that his purported waiver was not knowingly made, and, when judged against these strict constitutional standards, the government has failed to overcome the presumption against waiver by meeting the requisite burden of proof.

Basic to the defendant's argument is an extremely critical distinction: understanding one's constitutional rights is totally different from giving up one's constitutional rights. For a waiver to be valid, the defendant must not only know and understand his rights; there must also be a positive act of relinquishment on the part of the defendant in which he knows that by that action he gives up those constitutional safeguards. As the Supreme Court said in Johnson v. Zerbst, supra, for a waiver of constitutional rights to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." 304 U.S. at 464. The two processes -- that of being advised of one's constitutional rights and that of knowingly giving up those rights -- are therefore quite separate. Maintaining that distinction is essential both in logic and in law for the simple reason that an individual loses nothing by acknowledging that he understands his rights and by signing a form which makes such an ack-

nowledgement, but an individual gives away everything -- his entire panoply of constitutional safeguards -- when he waives his rights and signs a waiver form. To mix these two different processes is confusing and misleading and, indeed, prejudicial, and a constitutionally valid waiver of fundamental constitutional rights could not exist if such confusion in fact occurred.

The defendant contends that careful scrutiny of his conduct at the time of his interrogation reveals that, although he was certainly aware of his constitutional rights, he did not know that by signing the forms he was giving up those rights. The defendant further contends that the FBI's "Interrogation: Advice of Rights" form is fatally confusing and misleading because it mixes the process of advising with the process of waiving. That form should not be accepted, therefore, as adequate proof of a knowing and intentional waiver.

(a) The defendant's conduct clearly demonstrates that he did not knowingly and intelligently give up his constitutional rights.

At the suppression hearing, the agents testified repeatedly that Marble, when presented with the two waiver forms (Appendices 10 and 11), signed them with the comment that he understood his rights. At no time, however, did Marble ever indicate he intended to give up those rights. For example, Agent Mortenson testified:

> After he read [the form], and possibly two or three minutes thereafter, he advised that he understood his rights and he signed the form.
>
> (Transcript p. 9)

> We gave him the interrogation advice of rights form initially. He read it; he stated to us that he did understand his rights, and he signed it.
>
> (Transcript, p. 47)

With respect to the second form, Agent Mortenson testified:

> I then furnished him a second interrogation advice of rights form and told him it was exactly the same as the first one. I gave it to him, to ascertain by himself that this was in fact identical to the first interrogation of rights form. After he looked it over, he acknowledged that, yes, it was his rights, that he did recognize it to be the same as the first one, that he had read it, and he then signed the second one.
>
> (Transcript, p. 13)

And then later:

> I then furnished him with another interrogation advice of rights form and had him read it over to make sure he understood his rights and then we proceeded.
>
> (Transcript, p. 47)

In addition to the defendant's silence as to giving up his rights, the defendant's conduct after he signed the first form demonstrates conclusively that he did not in fact know that by signing that form he had given up his rights. According to the testimony of both agents, immediately after he signed the first form, Marble said that he did not want to answer any questions until his attorney was present. Within the space of a few seconds, then, Marble signed a document which said:

> I am willing to make a statement and answer questions. I do not want a lawyer at this time.

and then announced that he did not want to make a statement and that he did want a lawyer. Nothing can explain this seemingly irrational

behavior except that Marble was ignorant as to what the form in fact signified.

Marble's post-waiver statement must be regarded as prima facie evidence that he had no idea whatsoever that by signing the form he gave up his rights. In light of that clear demonstration of Marble's ignorance as to the import of the waiver forms, his signature cannot be considered to represent a knowing and intelligent waiver.

As Marble testified at the suppression hearing.

> Q: Do you remember signing this statement?
>
> A: Yes.
>
> Q: Did you know what you were signing when you signed it?
>
> A: No, I thought it was part of the information he was getting down.

(Transcript, p. 108)

Other than the words on the forms themselves, there is no evidence to show that Marble knew that by signing he gave up his rights.

As an additional point, it is well settled that fundamental constitutional rights cannot be waived by simple inadvertance. See Frazier v. Roberts, 441 F.2d 1224 (8th Cir. 1971); Farrant v. Bennett, 249 F. Supp 549, cert. denied, 384 U.S. 965 (1966); Hunt v. Warden, 335 F.2d 936 (4th Cir. 1964) and Mottram v. Murch, 458 F.2d 626 (1st Cir. 1972). The fact that Horace Marble spent two minutes reading and signing the first form and one minute on the second form should be taken into consideration when weighing the degree to which Marble's alleged waiver was in fact knowing. As

Judge Wisdom concluded in United States v. Johnson, 455 F.2d 311, (4th Cir. 1972):

> ... a two minute time span between the reading of a written advice form and the signing of the form is one factor which the trial court might consider in assessing whether the defendant knowingly and intelligently waived his rights.

(b) The FBI's "Interrogation: Advice of Rights" form is confusing and misleading and cannot by itself satisfy the government's burden of proof as to the validity of the defendant's waiver.

At the top of the form, in capitol letters, the following words appear:"INTERROGATION: ADVICE OF RIGHTS." Underneath appear the following words: "YOUR RIGHTS". The first sentence in the top portion of the form states:

> Before we ask you any questions, you must understand your rights.

This statement clearly implies that the defendant has no control over whether or not he will be questioned. The statement further implies that the purpose of that form in its entirety is, simply enough, to make sure that the individual reading the form (and then signing it) knows and understands his constitutional rights.

The bottom portion of the form is entitled: "WAIVER OF RIGHTS." No mention is made of "your" rights or "giving up your rights." Indeed, the first sentence of the waiver portion conveys a totally false impression as to the purpose of that entire section. "I have read this statement of my rights and I understand what my rights are." This sentence clearly implies that the form is intended merely to advise the reader of his rights.

As the standard FBI form, this document is presumably used with great regularity to show that a defendant knowingly and intelligently waived his constitutional rights, and yet there is no language whatsoever that conveys any meaning about "giving up" rights. The actual words of the waiver sentences themselves are:

> I am willing to make a statement and answer questions. I do not want a lawyer at this time.

The implications of signing a statement containing those words are, of course, tremendous, but those two sentences are surrounded by sentences which carry considerably less freight. "I understand and know what I am doing;" "I have read this statement of my rights and I understand what my rights are."

Any individual signing this form could logically believe that he is indicating merely that he was advised of his rights and understands them -- nothing more. Perhaps intentionally, this form mixes the function of advising the defendant of his rights with the quite different function of a defendant waiving his rights. The defendant submits that the language of this form is misleading, vague, unclear. The heavy burden of the government to show a knowing waiver of constitutional rights cannot be met by Horace Marble's signature on the bottom of this form -- and nothing more.

Agent Mortenson's testimony that he provided the second form only to satisfy Bureau routine is further compelling evidence as to the state of mind of the agents when they provided Marble with this second form.

In light of the form's own confusion and the cavalier attitude on the part of the agents towards the

contents of the form, and in view of Horace Marble's clear lack of understanding as to the form's meaning, Marble's waiver was neither knowing nor intelligent, and his subsequent confession should have been suppressed.

## CONCLUSION

For all of the foregoing reasons, the defendant-appellant respectfully requests that the judgment of conviction entered below be vacated and that the case be remanded for further proceedings in which any all evidence relating either directly or indirectly to the statement taken from the defendant on October 23, 1974 is suppressed.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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DOCKET NO. 75-1058

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UNITED STATES OF AMERICA

Appellee

vs.

HORACE MARBLE

DEFENDANT-APPELLANT

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CERTIFICATE OF SERVICE

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I hereby certify that a copy of the Brief and Appendix of the defendant-appellant in the above matter was mailed postage pre-paid to Albert S. Dabrowski, Esq., Assistant United States Attorney, Hartford, Connecticut

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